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No. 71-[illegible]

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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TOWN PARK HOTEL CORPORATION, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-610

TOWN PARK HOTEL CORPORATION, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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### OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 23-32) is reported at 29 T.C.M. 1150. The opinion of the court of appeals (Pet. App. 20-22) is reported at 446 F. 2d 878.

### JURISDICTION

The judgment of the court of appeals was entered on August 10, 1971. The petition for a writ of cer-

tiorari was filed on November 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether, for purposes of commencing the period within which condemned property must be replaced in order to qualify for nonrecognition of gain under Section 1033(a)(3) of the Internal Revenue Code of 1954, petitioner realized gain on the condemnation of its property when, pursuant to court order, it withdrew the sum deposited with the court by the condemnor, even though the amount of compensation was in litigation.

## STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and of the Tennessee Code are set forth in the Appendix to the petition (pp. 12-19).

## STATEMENT

Petitioner, a Tennessee corporation, owned and operated a motel, restaurant, and related facilities in Memphis, Tennessee. On August 14, 1964, the Commissioner of Highways and Public Works of the State of Tennessee filed a condemnation petition in the Tennessee Circuit Court against petitioner for the purpose of acquiring a portion of petitioner's property and, at the same time, deposited $722,476 with the court. Petitioner's basis in the property condemned was approximately $272,000. (Pet. App. 24, 27.)

On August 21, 1964, the circuit court entered an order of condemnation and appropriation, sustaining the State's condemnation petition as of August 21, 1964, appropriating the land to the use of the State, granting the State immediate legal possession and the right of entry for the purpose of removing improvements, and reserving to petitioner its right to contest the amount of damages for the taking of the property. On September 30, 1964, pursuant to the court's order of disbursement, petitioner withdrew the sum deposited. (Pet. App. 24-25.)

On April 16, 1966, following a jury trial on the issue of damages, the court entered a decree divesting the title of petitioner and vesting title in the State of Tennessee, recording the jury verdict, and entering judgment whereby petitioner was awarded $725,000 for the land and improvements, $215,000 for incidental damages, and interest (Pet. App. 25).

On April 28, 1967, petitioner purchased, for more than $1.6 million, property which was similar to the property condemned (Pet. App. 25).

Section 1033(a)(3)(B)(i) of the Internal Revenue Code of 1954, as effective in the years in suit, provides, to the extent pertinent here, for the nonrecognition of gain on the involuntary conversion of a taxpayer's property, if the taxpayer replaces the property with other property similar or related in use within "one year after the close of the first taxable year in which any part of the gain upon conversion is realized." Petitioner, which filed its income tax returns on the basis of a June 30 fiscal year, claimed that it did not realize the gain on the condemnation

of its property until April 16, 1966, when the amount of damages was finally fixed, and, therefore that its replacement of the property on April 28, 1967, entitled it to the nonrecognition benefits of Section 1033 (Pet. App. 25, 28).

Applying the "claim of right" doctrine, the Commissioner determined that petitioner realized part of the gain on September 30, 1964 (during its fiscal year ending June 30, 1965), when it withdrew the deposit of $722,476, and that the time for replacing the property without recognition of gain therefore expired on June 30, 1966 (Pet. App. 28-29). The Tax Court sustained the Commissioner's determination (Pet. App. 23-32), and the court of appeals affirmed *per curiam* (Pet. App. 20-22).

## ARGUMENT

The decision below is correct. There is no conflict of decisions or any other ground for further review.

1. This Court's decisions establish that if a taxpayer receives income under a claim of right and without restriction as to its disposition, he must include the income in his tax return for the year of receipt, even though he may be required to repay the money received in a later year. See *North American Oil* v. *Burnet*, 286 U.S. 417, 424; *Healy* v. *Commissioner*, 345 U.S. 278, 282; see also Treasury Regulations on Income Tax (1954 Code), Section 1.451-2. Both courts below correctly held that the claim of right doctrine was applicable in the instant case.

Under the relevant Tennessee statutes (Tenn. Code Ann. (1969 Cum Supp.), Section 23-1526 *et seq.*), the condemning authority deposits with the court the amount it determines as damages, and files a condemnation petition. After the granting of such a petition, or within five days of filing if it is not contested, the State obtains the right of entry and legal possession, and the owner obtains the right to withdraw the sum deposited, with no restrictions as to use, without prejudice to his rights to contest the amount, and provided only that he agrees to repay the difference between such sum and the amount finally awarded, should the award be less than the deposit.[1]

Petitioner therefore had the right to withdraw the sum deposited and use it for its own purposes without restriction. Upon exercising this right, it realized income, and it is immaterial that after litigation a portion, or even all, of the money so received might have to be restored.

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[1] In *Catlett* v. *State*, 207 Tenn. 1, 10-11, 336 S.W. 2d 8, 12, the Supreme Court of Tennessee stated that the deposit feature of the Tennessee condemnation statute was added "for the benefit of the landowner," and allows him "immediately to take down this sum of money without losing any rights whatsoever to appeal and attempt to establish a greater valuation." See also *Kennedy* v. *Chattanooga*, 56 Tenn. App. 198, 405 S.W. 2d 653. Indeed, the Tennessee courts have referred to the withdrawal feature as allowing the landowner "to realize, without delay and without prejudice, the amount tendered into court and if he wishes to do so to use it to buy property to replace that taken from him." *Clinton Livestock Auction Co.* v. *Knoxville*, 52 Tenn. App. 614, 616, 376 S.W. 2d 743, 744.

2. There is no conflict with *Clinton Hotel Realty Corp.* v. *Commissioner*, 128 F. 2d 968 (C.A. 5), as petitioner claims (Pet. 9-11). In that case, the Fifth Circuit ruled that a security deposit held by a lessor for the final year's rental of a ten-year lease and as liquidated damages for the performance by the lessee of the conditions of the lease was not prepaid rental income to the lessor in the year received. But the court's conclusion was based on the finding that the lessor was accountable for the deposit and had "no present right or claim of full ownership" to it (128 F. 2d at 969). Here, on the other hand, petitioner possessed a statutory right (which it exercised) to the possession and unrestrained use of the money. At all events, decisions of the Fifth Circuit subsequent to *Clinton Hotel* show that it applies the claim of right doctrine in the same manner as the Sixth Circuit, and would have reached the same result on the facts of this case. See, *e.g.*, *Whitaker* v. *Commissioner*, 259 F. 2d 379, 382; *Van Wagoner* v. *United States*, 368 F. 2d 95. Indeed, in *Van Wagoner*, the court concluded, under circumstances similar to those presented here, that (368 F. 2d at 97-98) its holding in *Clinton Hotel* was inapposite.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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